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NO. 99-1401

IN THE SUPREME COURT OF THE UNITED STATES

FRANK X. HOPKINS, Warden
of the Nebraska State Penitentiary, *Petitioner*,

v.

JOHN BYRON NEWMAN, *Respondent*.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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JOHN BYRON NEWMAN,
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RESPONDENT'S BRIEF IN OPPOSITION

The respondent, John Byron Newman, respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Eighth Circuit's opinion in this case. That opinion is reported as Newman v. Hopkins, 192 F.3d 1132 (8th Cir. 1999).

STATEMENT OF THE CASE

This habeas corpus action alleges constitutional violations arising during John Newman's second trial for sexual assault. Newman s first trial for the offense resulted in a mistrial because of a deadlocked jury.

With a few exceptions, the evidence against Newman was the same at both trials. Not surprisingly, the state's case rested primarily on the testimony of the victim of the sexual assault. In the early morning hours of March 21, 1993, after the victim had been asleep for several hours, she was awakened by a knock at the door. When she opened

the door, an assailant forced his way into the dimly-lit apartment. He sexually assaulted her there, making sure during the majority of the attack that her face was covered.

The victim promptly reported the incident to the police. She described her attacker as an Hispanic male, about 5'6" to 5'8" tall, with dark hair, an olive complexion, and a moustache. She stated that her assailant was wearing a white t-shirt, black pants, a black leather jacket, and white tennis shoes. She also told the police that her assailant had spoken with an Hispanic accent.

Just after the attack, police officers showed the victim photographic lineups of potential suspects, but the victim did not recognize her assailant in the initial displays. However, four days after the assault, the police showed the victim a third set of photographs. From these photographs, the victim identified John Newman as her assailant.

In addition to the victim's identification, the state offered the testimony of Julie Denny and Russell Grady, each of whom testified to seeing Newman within several hours of the assault wearing a black leather jacket. A black leather jacket unconstitutionally seized from Newman was also admitted at this second trial.[1]

Newman's defense, in turn, was that of mistaken identity. The assailant's purported Hispanic accent played a significant role in that defense. The man Julie Denny had seen on the night of the assault did not speak with any type of accent. Moreover, Newman presented the testimony of the Reverend Stewart Fimhaber, who stated that he had eaten

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[1] On direct appeal, the Nebraska Supreme Court held that the jacket was unconstitutionally seized, but that its admission into evidence at trial was harmless beyond a reasonable doubt. State v. Newman, 548 N.W.2d 739, 749 (Neb. 1996). The Eighth Circuit declined to disturb this ruling in the appeal of Newman's habeas action.

dinner with Newman early in March of 1993, and that Newman did not speak with an Hispanic accent. However, when Newman attempted to introduce a voice exemplar as evidence that he did not speak with an Hispanic accent, his efforts were thwarted. The trial court ruled that Newman could say anything he wanted to say, but that doing so would waive his Fifth Amendment privilege against self-incrimination and would subject him to cross-examination by the state. Based upon the trial court's ruling, Newman did not give the voice exemplar. Newman was then convicted, and sentenced to a term of twenty-five to fifty years imprisonment, with no possibility of parole.

Newman appealed his conviction through the Nebraska appellate courts. Among other arguments, Newman alleged that his due process rights were violated when the trial court ruled that he could not provide a voice exemplar to the jury without waiving his Fifth Amendment privilege against self incrimination. The Nebraska Supreme Court rejected all of Newman's claims of error. With respect to the voice exemplar, the court agreed that Newman would not waive his Fifth Amendment privilege by offering a voice exemplar. However, it determined that an exemplar can nevertheless be excluded if it possesses insufficient relevance or reliability. Newman, 548 N.W.2d at 751-52. The Nebraska Supreme Court held that, because of the ease with which a voice exemplar may be feigned and the lack of evidence from Newman establishing the genuineness of the exemplar, the evidence would have been properly excluded by the trial court regardless of its erroneous constitutional conclusions. Id. at 752.

After Newman's conviction was affirmed, he filed a petition for a writ of habeas corpus in which he reasserted the claim relating to the voice exemplar. Employing the amended habeas standards set forth in the Antiterrorism and Effective Death Penalty Act

of 1996 (hereinafter "AEDPA"), the district court concluded that Newman was not entitled to relief. However, the Eighth Circuit reversed. Newman v. Hopkins, 192 F.3d 1132 (8th Cir. 1999). From this Court's cases interpreting the due process rights of an accused, the Court of Appeals discerned that a defendant is entitled "to introduce a voice exemplar without waiving his Fifth Amendment privilege against self-incrimination." Id. at 1135. The Court of Appeals then held that the Nebraska Supreme Court's failure to remedy the denial of Newman's due process rights resulted in an outcome that "cannot reasonably be justified under existing Supreme Court precedent." Id. at 1136.

The Eighth Circuit rejected the State's argument that the Nebraska Supreme Court's decision not to correct the constitutional error rested on a state evidentiary rule requiring reliability. According to the Court of Appeals,

> [W]e read the Nebraska Supreme Court's statement that "the conditions under which Newman spoke to the victim could not be reproduced" as a *per se* rule of exclusion akin to that which the United States Supreme Court has held infringes impermissibly upon a defendant's right to testify on his own behalf.

Id. Finally, applying the harmless error standard set forth in Chapman v. California, 386 U.S. 18 (1967), the Eighth Circuit concluded that the constitutional error could not be deemed harmless. Given that the Hispanic accent was "an important factor in determining whether [Newman] fit the description of the attacker," and in light of the fact that Newman's first trial ended in a mistrial, the Court held that the exclusion of the voice exemplar was not harmless beyond a reasonable doubt. Id. at 1137.

ARGUMENT

I. BECAUSE THE COURT OF APPEALS' CONSTRUCTION OF "CLEARLY ESTABLISHED FEDERAL LAW" IS CONSISTENT WITH THE LANGUAGE AND

INTENT OF 28 U.S.C. § 2254(d)(1), AND BECAUSE A WRIT OF HABEAS CORPUS IS JUSTIFIED UNDER ANY RATIONAL INTERPRETATION OF § 2254(d)(1), THE DECISION DOES NOT WARRANT CORRECTION BY THIS COURT.

The State of Nebraska devotes much of its petition for a writ of certiorari to parsing the recently-amended language of § 2254(d)(1), which authorizes a writ of habeas corpus when a state decision is "contrary to, or involved an unreasonable application of, clearly established federal law as determined by the Supreme Court." According to the State, this language suggests that the "contrary to" rule may apply to some issues, while the "unreasonable application of" analysis is reserved for others. The State then discusses at length the differing approaches that the federal circuit courts have developed for applying the new habeas standards.

Many of these points undoubtedly sound familiar. Indeed, these very observations were made by the petitioners in Williams v. Taylor, 163 F.3d 860 (4th Cir. 1998), and this very issue is already before the Court through a writ granted in that case on April 5, 1999. Williams v. Taylor, 119 S. Ct. 1355 (1999). Therefore, to the extent there is confusion in the circuits regarding how to apply the new AEDPA standards, that confusion will soon be resolved. In the meantime, however, there is no reason to delay denial of the petition in this case. Under any plausible interpretation of § 2254(d)(1), Newman is entitled to a writ of habeas corpus.

The right to introduce a voice exemplar without waiving the privilege against self-incrimination could not be more "clearly established." The Fifth Amendment to the United States Constitution provides that no person "shall be compelled in any criminal case to be a witness against himself." U.S. CONST. AMEND. V. However, it is now well settled that

simply compelling a defendant to speak does not automatically violate this privilege. Instead, the Fifth Amendment privilege against self-incrimination "protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature." Schmerber v. California, 384 U.S. 757, 761 (1996) (emphasis added).

Consistent with this interpretation, the Court has held that compelled production of a voice exemplar generally does not violate a defendant's Fifth Amendment privilege. United States v. Dionisio, 410 U.S. 1, 7 (1973). A typical voice exemplar does not require a defendant to utter statements of a testimonial nature, but merely compels use of the voice "as an identifying physical characteristic." United States v. Wade, 388 U.S. 218, 222-23 (1967). Therefore, just as the privilege does not protect against "compulsion to submit to fingerprinting, photography, or measurements," it does not protect against compulsion of a voice sample. Id.

As a matter of Due Process, these same principles apply whenever a defendant wishes to offer a voice exemplar on his own behalf. Wardius v. Oregon, 412 U.S. 470, 474 (1973). Because of the exemplar's nontestimonial nature, the defendant should be allowed to submit the exemplar without waiving his right against self incrimination or subjecting himself to cross examination. Any other rule would interfere with the concept of reciprocity which the Supreme Court has found to be firmly embedded in the Due Process Clause. Id. at 274 & n. 6 (noting its consistent disapproval with "state trial rules which provide nonreciprocal benefits to the State when the lack of reciprocity interferes with the defendant's ability to present a defense"). In addition, a rule against the submission of a voice exemplar by a defendant would unconstitutionally obstruct a

defendant's Due Process right to "present the defendant's version of the facts . . . to the jury so that they may decide where the truth lies." Washington v. Texas, 388 U.S. 14, 19 (1967); see also United States v. Nixon, 418 U.S. 683, 709 (1974) ("[t]he very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence.")

Relying on the opinions in Dionisio, Wade, and Wardius, the Eighth Circuit has correctly defined the right to submit a voice exemplar without sacrificing the Fifth Amendment privilege against self-incrimination. The fact that the Court of Appeals "blended" Supreme Court cases to discern this right makes it no less "clearly established." The circuits addressing this question agree that the manner in which the right is "clearly established" affects only whether the "contrary to" or "unreasonable application of" standard of § 2254(d)(1) applies on habeas review. See, e.g., Matteo v. Superintendent, 171 F.3d 877 (3d Cir. 1999)(*en banc*)(discussing circuit interpretations of § 2254(d)(1)). Because the Nebraska Supreme Court's denial of the right to submit the voice exemplar is *both* "contrary to" and "an unreasonable application of" this Supreme Court precedent, a writ of habeas corpus must issue under any rational reading of § 2254(d)(1). Accordingly, the petition for a writ of habeas corpus should be denied.

II. BECAUSE THE COURT OF APPEALS' APPLICATION OF THE CHAPMAN V. CALIFORNIA HARMLESS ERROR STANDARD RATHER THAN THE BRECHT V. ABRAHAMSON STANDARD WAS NOT ERRONEOUS, AND BECAUSE THE USE OF BRECHT WOULD NOT ALTER THE RESULT IN NEWMAN'S CASE, NO REASON EXISTS FOR THE GRANT OF CERTIORARI.

The Court should likewise resist the call to review the Eighth Circuit's harmless error review in this case. The Eighth Circuit's policy of applying Chapman v. California to

constitutional violations which have not received a harmless error analysis in the state courts is entirely consistent with this Court's precedent. Moreover, the error would be considered harmful even under the standard announced in Brecht v. Abrahamson, 507 U.S. 619 (1993).

In the petition for a writ of certiorari, the State contends that the Supreme Court has developed two harmless error standards for non-structural trial errors: the Chapman standard for cases on direct appeal, and the test set forth in Brecht for cases on collateral review. In fact, however, the Supreme Court's divisions fall along different lines. As the Eighth Circuit correctly recognized in Orndorff v. Lockhart, 998 F.2d 1426 (8th Cir. 1993), the question of whether Brecht or Chapman applies depends upon whether the constitutional error received a Chapman harmless error review before the case reached the federal courts on a habeas petition.

The genesis for this dichotomy can be found in the Supreme Court's opinion in Brecht. In Br cht, the petitioner claimed that the state's references during trial to his post-Miranda silence violated his right to due process. The state appellate courts agreed that Brecht's rights had been violated. However, Brecht was denied relief when the Wisconsin Supreme Court determined, in accordance with Chapman, that the error was "harmless beyond a reasonable doubt." 507 U.S. at 626. Thereafter, Brecht filed a habeas petition under 28 U.S.C. § 2254, reasserting his due process claim. When his claim reached the Supreme Court, however, the sole issue for debate was whether the federal courts were obligated, as the State had been, to consider the effect of the due process violation under Chapman. Id. at 622-23.

The Supreme Court concluded that Brecht's case should be resolved with a view toward the principles underlying habeas relief. Id. at 632. The Court noted that a petition for a writ of habeas corpus ordinarily follows a direct appeal in the state courts. Id. at 633. Because of the thoroughness of that process, a presumption of finality and legality attaches to a petitioner's conviction and sentence after direct review. The writ of habeas corpus provides a limited avenue for overcoming that presumption, and is reserved for those petitioners who have been grievously wronged. Id. at 634. Absent such circumstances, a federal habeas court must respect the state court's good-faith efforts to honor constitutional rights. Id. at 634-35.

Consistent with these principles, the Supreme Court decided that Brecht was not entitled to yet another Chapman review in his case. According to the Court, "it scarcely seems logical to require federal habeas courts to engage in the identical approach to harmless-error review that Chapman requires state courts to engage in on direct review." Id. at 636. Such a decision would result in duplication and undermine the States' interest in the finality of its decisions. Therefore, "[a]bsent affirmative evidence that state-court judges are ignoring their oath," a less onerous harmless error analysis is appropriate on habeas review. Id.

The Eighth Circuit's decision in Orndorff follows Brecht's reasoning to its only logical conclusion. Because the Supreme Court's opinion in Brecht was based on respecting the finality and integrity of state court decisions, it follows that Brecht does not apply if the state court has never *achieved* finality on the question of harmless error. Orndorff, 998 F.2d at 1430. In those instances, Orndorff does nothing more than ensure that, at some point in

the progression of the case, a constitutional error receives the harmless error review the Court in Chapman proscribed. Chapman, 386 U.S. 218, 24 (1967).

The State attempts to undermine this logic by pointing out in its petition that other circuits have rejected Orndorff. It also claims that undertaking a Chapman review in cases such as Newman's strips Brecht of its significance. None of these arguments, however, warrant this Court's attention. While the Eighth Circuit may be in the minority in applying Chapman, the other circuits' failure to recognize the true meaning of Brecht is no reason for this Court to retreat from its own principles in that case. Moreover, the State has obviously overstated Orndorff's significance. In reality, the role of Brecht has already been diminished with the passage of the AEDPA. Under the AEDPA, the federal courts do not perform their own harmless error analysis so much as review the reasonableness of a state court's harmless error calculus. Nevers v. Killinger, 169 F.3d 352 (6th Cir. 1999).

In any event, there are many instances in which the distinction between the Brecht and Chapman does not make a difference, because the constitutional error is clearly harmless or clearly harmful under either standard. This case is a prime example of a case which requires reversal under either Brecht or Chapman. As the panel's decision recognizes, Newman's was an extremely close case. The first trial on this offense, in which the prosecutor introduced virtually the same evidence, ended in a mistrial when the jury could not reach a verdict. In such a case, almost any piece of evidence can tip the balance from innocence to guilt.

Nothing had more potential of influencing the jury than evidence bearing on the identity of the perpetrator of the crime. Because the main witnesses in the crime encountered the alleged attacker in the dark under circumstances particularly susceptible

to unreliable identification,[2] each detail of identification was important. The question of whether Newman has an Hispanic accent was therefore crucial to determining whether he fit the description of the attacker. Under these circumstances, the Court of Appeals was correct in concluding that the denial of Newman's right to present evidence on this point was not harmless beyond a reasonable doubt. Moreover, because of the exculpatory value of Newman's lack of an Hispanic accent, the constitutional violation could not have helped but have a "substantial and injurious effect or influence in determining the jury's verdict." Brecht, 507 U.S. at 637 (quoting Kotteakos v. United States, 328 U.S. 750, 776 (1946)).

As this analysis demonstrates, the constitutional error in Newman's case was harmful under both Chapman and Brecht. Under these circumstances, the petition for a writ of certiorari should be denied.

CONCLUSION

For the foregoing reasons, the Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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[2]As the facts set forth in this brief demonstrate, the attack occurred late at night in the victim's dimly-lit apartment, after she had been sleeping for hours. The victim testified that she was crying throughout the attack. Under these circumstances, anything that corroborated the victim's identification was crucial to a jury believing Newman was her attacker.

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